

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE LELAND JAMES RUBESH and
BONNIE LYNN RUBESH,

Debtors.

BAP No. WY-06-007

LELAND JAMES RUBESH and
BONNIE LYNN RUBESH,

Appellants,

v.

RANDY ROYAL, Trustee,

Appellee.

Bankr. No. 04-22317
Chapter 7

ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Before CORNISH, MICHAEL, and NUGENT, Bankruptcy Judges.

CORNISH, Bankruptcy Judge.

The parties did not request oral argument, and after examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Debtors/Appellants Leland and Bonnie Rubesh (“Debtors”) appeal a judgment entered by the United States Bankruptcy Court for the District of

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Wyoming in favor of the Chapter 7 trustee, Randy L. Royal (“Trustee”), granting Trustee’s Motion to Compel Turnover of certain property held by Debtors.

Debtors also appeal the court’s order denying their request to alter or amend the turnover order. Debtors claim that the property requested is subject to an IRS tax lien, rendering it of “inconsequential value” under 11 U.S.C. § 542(a), and therefore not subject to turnover. For the following reasons, we affirm the decision of the bankruptcy court.

I. Background

The Debtors filed their Chapter 7 petition on December 2, 2004. They listed the IRS as a secured creditor in the amount of \$74,712, and identified the secured property as certain real estate valued at \$108,100 and “all other assets.”¹ After the 341 creditor’s meeting, the Trustee sent the Debtors’ attorney a letter requesting that Debtors calculate the value of certain accounts receivable and remit one quarter of that value to the Trustee. The Trustee then filed a Motion to Compel Turnover in which he requested that the court order the Debtors to turn over property of the estate consisting of \$1,158.35 in accounts receivable, a non-exempt bank account containing \$121, firearms valued at \$230, jewelry valued at \$115, and a 1959 Austin Healy automobile valued at \$250. In the alternative, the Trustee gave the Debtors the option of repurchasing the firearms, jewelry and automobile from the estate in the amounts stated. The Trustee further represented to the court that he believed this to be an asset case, and that upon turnover he would verify the existence and extent of the IRS lien and then deal directly with the IRS regarding sale of the requested estate property.

The Debtors filed an objection to the turnover motion, arguing that all assets were encumbered by the IRS tax lien, which lien exceeded the value of all of Debtors’ property, and that the Trustee would favor a secured creditor over

¹ Schedule D, *in* Appellants’ Appendix at 12.

unsecured creditors if the turnover motion was granted.

A hearing was held on the Trustee's Motion and the Debtors' Objection. The bankruptcy court granted the Trustee's Motion and memorialized its decision in a hand-written minute order, signed by the Deputy Court Clerk.² The minutes reflect that the IRS had not yet filed a claim, and that after turnover of the property the Trustee could investigate the status of the IRS claim. No transcript of this hearing is part of the appellate record, and the Court is thus deprived of the opportunity for a more meaningful review.

The Debtors filed a Motion to Alter or Amend the order granting the Trustee's turnover motion, and attached copies of federal tax liens totaling \$205,460 filed against Debtors' property. The Debtors argued that the Trustee's motion and the court's decision were premature, and that the court should have considered whether the IRS was likely to release part of its liens before it ordered turnover of the property to the Trustee. In a written order, the court denied the Motion to Alter or Amend on the grounds that the Debtors failed to raise new issues or error of law or fact, and that the Trustee had the responsibility and authority to liquidate the estate for the benefit of all creditors. This appeal followed.

II. Jurisdiction

This Court has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002. Neither party elected to have this appeal heard by the United States District Court for the District of Wyoming, thus consenting to review by this Court.

² The court's order states: "These minutes constitute the court's official order in this matter[.]" Minutes of Proceedings, *in* Appellants' Appendix at 11.

A decision is considered final if “it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). Although one of the orders appealed is memorialized in a minute order, the form of that order does not prohibit appellate review where there is no question as to the finality of the bankruptcy court’s decision. *See, Kunkel v. Cont’l Cas. Co.*, 866 F.2d 1269, 1272 n.3 (10th Cir. 1989) (citing *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 382-388 (1978)). This court is satisfied that a turnover order is a final, appealable order. *In re Yates*, 332 B.R. 1, 3 (10th Cir. BAP 2005). Failure to set forth a judgment or order on a separate document does not affect the validity of an appeal from that judgment or order. Fed. R. App. P. 4(a)(7). The clerk of court for the Wyoming Bankruptcy Court has authority to execute documents as authorized by the court. Wyo. L.B.R. 5003-1.

III. Standard of Review

The facts herein are not disputed; therefore, the only issues presented on appeal involve questions of law. Questions of law are reviewable *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996). *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court’s decision. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991). This court will therefore treat the minute order as a final, appealable order and review the decision of the bankruptcy court expressed in that order, along with the court’s order denying the Motion to Alter or Amend.

IV. Discussion

A trustee in bankruptcy is charged with the obligation of gathering the assets of the estate and managing those assets to maximize their value to the estate: “The trustee shall - (1) collect and reduce to money the property of the

estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest” 11 U.S.C. § 704.³ The Bankruptcy Code also imposes duties upon the debtor. “[A] debtor who voluntarily submits him or herself to the jurisdiction of the bankruptcy court to obtain the benefit of a discharge of debts, must fulfill certain duties to insure that estate assets are administered in accordance with applicable law.” *In re Midkiff*, 342 F.3d 1194, 1201 (10th Cir. 2003) (quoting *In re Beach*, 281 B.R. 917, 921 (10th Cir. BAP 2002)). A debtor is required to “surrender to the trustee all property of the estate” 11 U.S.C. § 521(4). Federal Rule of Bankruptcy Procedure 4002(4) further requires that debtors “cooperate with the trustee in . . . the administration of the estate” Property of the estate is defined as all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a).

Here, the Debtors do not deny that they have an interest in the property that the Trustee seeks to recover, but they object to surrendering the property because they believe it to be over-encumbered by tax liens. Turnover, however, is not intended as a remedy to determine disputed rights of parties to property, but is a remedy to obtain what is acknowledged to be property of a debtor’s estate. *See, e.g., Gallucci v. Grant (In re Gallucci)*, 931 F.2d 738, 741 (11th Cir. 1991); *FLR Co., Inc. v. Brant Constr. Co. (In re FLR Co., Inc.)*, 58 B.R. 632, 634 (Bankr. W.D. Pa. 1985). To prevail in an action seeking to compel a debtor to surrender estate property, the trustee must prove: (1) that the property at issue belongs to the bankruptcy estate, and (2) that the debtor has the present power to surrender

³ This case was filed before October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 became effective. All statutory references to the Bankruptcy Code are to 11 U.S.C. §§ 101 to 1330 (2004), unless otherwise specified. All references to the Federal Rules of Bankruptcy Procedure are to Fed. R. Bankr. P. (2004), unless otherwise specified.

the property. *See, Amdura Nat'l Distrib. Co. v. Amdura Corp., Inc. (In re Amdura Corp.)*, 75 F.3d 1447, 1451 (10th Cir. 1996) (debtor's ownership of property is first inquiry); *In re Santaella*, 298 B.R. 793, 799 (Bankr. S.D. Fla. 2002). Once the trustee makes out a *prima facie* case on these issues, the burden shifts to the debtor to produce some evidence disputing the trustee's *prima facie* case. *See, In re Lawrence*, 251 B.R. 630, 640 (Bankr. S.D. Fla. 2000) (citing *Maggio v. Zeitz*, 333 U.S. 56 (1948)), *aff'd*, 279 F.3d 1294 (11th Cir. 2002).

In this case, there was no dispute that the property sought by the Trustee was owned by the Debtors and was property of the bankruptcy estate. Also undisputed was the fact that the Debtors had possession of the property and the power to surrender it to the Trustee. The Trustee met his burden of proof to compel Debtors to turn over the property. The Debtors simply refused to comply with the request because they believed that the Trustee was improperly acting as an agent of the IRS. Like the bankruptcy court, we do not believe this reason is sufficient to defeat the Trustee's right to the property. There is no evidence in the record stating or implying that some agreement exists for the Trustee to operate on behalf of the IRS and to the disadvantage of other creditors. The Trustee stated that after he received the property, he would determine the existence, nature and extent of any liens with the IRS. The record reflects that no claim was filed by the IRS and that the validity of its lien had not yet been determined at the time the bankruptcy court's decisions were entered.

On appeal, the Debtors argue that the property was of "inconsequential value" since it was over-encumbered, and that therefore the Trustee should be prohibited from collecting the property pursuant to 11 U.S.C. § 542(a).⁴ The

⁴ The applicable language provides: "[A]n entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of

(continued...)

record does not reflect that the Debtors raised this particular argument or statutory language to the bankruptcy court. “Issues not raised before the trial court will not ordinarily be considered when raised for the first time on appeal.” *Diviney v. NationsBank of Tx. (In re Diviney)*, 225 B.R. 762, 771 (10th Cir. BAP 1998). Debtors did argue that the requested property was fully encumbered by tax liens, but the focus of their objection to the Trustee’s turnover request was that the Trustee was favoring a secured creditor over unsecured creditors. Accordingly, this Court will not consider the Debtors’ argument regarding “inconsequential value” in this appeal, except to affirm the bankruptcy court’s decision that the Trustee should take possession of the property and then investigate the status of the liens to determine how best to maximize the value of these assets to the estate.

The Debtors direct us to cases which state that a trustee is to work for the unsecured, rather than secured, creditors. The Court agrees that a trustee should work to increase the value of the estate to benefit creditors. The cases cited by the Debtors, however, involve situations where the trustee made arrangements with a secured creditor to receive some sort of special compensation to generate a fee for himself,⁵ or received compensation in exchange for benefitting a particular secured creditor over another creditor,⁶ or where the trustee was clearly seeking to generate administrative fees.⁷ None of those situations exist here. Instead, we have the Trustee’s representation that he believes it would benefit the estate to recover this property, and then determine the validity and extent of the IRS lien.

⁴ (...continued)
inconsequential value or benefit to the estate.”

⁵ See, *In re Tobin*, 202 B.R. 339 (Bankr. D.R.I. 1996).

⁶ See, *In re Feinstein Family P’ship*, 247 B.R. 502 (Bankr. M.D. Fla. 2000).

⁷ See, *In re Lambert Implement Co., Inc.*, 44 B.R. 860 (Bankr. W.D. Ky. 1984).

Thus, it is possible that the Trustee can sell these assets free from the IRS liens and generate income for the estate.

It is the Trustee's statutory duty to administer the assets of the estate and, once the property is surrendered to him, to determine the value of such property to the estate and determine whether to sell it pursuant to § 363, abandon it pursuant to § 554, or otherwise dispose of it pursuant to § 724 or § 725. It is within the Trustee's discretion to determine which action to take regarding the property, but first he must obtain possession. Some of the assets sought by the Trustee are bank accounts and receivables, and he is attempting to obtain and preserve these liquid assets as is his duty. There is no evidence in the record, no finding by the bankruptcy court, nor issue raised on appeal that the Trustee is pursuing these assets primarily to obtain Trustee compensation. Accordingly, it is this Court's decision that Debtors should surrender the requested property to the Trustee, and it will then be the Trustee's duty to resolve the issue of the IRS tax lien and to determine how to dispose of these assets for the benefit of the estate.

V. Conclusion

For the reasons stated herein, the decision of the bankruptcy court granting the Trustee's Motion to Compel Turnover and denying Debtors' Motion to Alter or Amend Order is AFFIRMED.